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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANCIS P. TRACEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals, in light of *Machibroda*, erred in not holding an evidentiary hearing to resolve the controverted genuine issues of fact raised in Petitioner's 28 U.S.C. § 2255 petition, affidavits and motions.

II. Whether the Court of Appeals erred in affirming the District Court's denial of a 28 U.S.C. § 2255 Motion wherein the petitioner's conviction resulted from denial of procedural rights protected by the Fifth Amendment Due Process Clause and Sixth Amendment Right to a Fair Trial, in that: prosecutorial misconduct which goes beyond the pale occurred and was of such magnitude as to infect the entire trial process; prosecutorial misconduct that infects the § 2255 proceedings; introduction of perjured testimony knowingly upon the part of the prosecution; failure to disclose exculpatory evidence; and prosecutorial misconduct which undermines the fair trial process.

III. Whether the Court of Appeals thwarted Petitioner's Constitutional rights under Article I, Section 9 of the Constitution of the United States, to have his Habeas Petition fully heard and aired and have redress to the Courts, in that the Court of Appeals ruled on Petitioner's Appeal without having fully treated or even read Petitioner's Briefs on Appeal, as clearly indicated by the erroneous written opinion handed down by the Court of Appeals in Petitioner's Appeal.

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Francis P. Tracey, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the First Circuit entered on July 27, 1984.

Opinions Below

The Order of the Court of Appeals for the First Circuit in *Francis P. Tracey* v. *United States of America*, No. 84-1100 (July 27, 1984), which affirms the order of the District Court, is published but is not reported, and is attached hereto as Appendix A. (A-1). The order of the Court of Appeals for the First Circuit on the Petition for Rehearing was entered on September 11, 1984. A copy of the Order is attached hereto as Appendix B. (B-1). A copy of the Order of the United States

District Court for the District of Massachusetts (A. David Mazzone, District Judge), dated November 7, 1983, which dismissed the Motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody, is attached hereto as Appendix C. (C-1).

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(I) to review a judgment of a Court of Appeals by writ of certiorari.

Constitutional Provisions

The following provisions of the United States Constitution are involved:

> Article 1, Section 9, ¶ 2, of the Constitution of the United States of America. The text of said Article 1, Section 9, ¶ 2, is attached hereto as Appendix G. (G-1).
>
> United States Constitutional Amendment V. The text of said provision is attached hereto as Appendix D. (D-1).
>
> United States Constitutional Amendment VI. The text of said provision is attached hereto as Appendix E. (E-1).
>
> United States Constitutional Amendment XIV. The text of said provision is attached hereto as Appendix F. (F-1).

Proceedings Below

On January 18, 1981, Petitioner Francis P. Tracey was indicted on three counts of income tax evasion and three counts of filing false income tax returns, in violation of 26 U.S.C. § 7201 and § 7206.

On May 1, 1981, Petitioner Francis P. Tracey was convicted by a jury on six counts and sentenced by District Judge A. David Mazzone to eighteen months incarceration and a $15,000 fine was imposed on May 18, 1981.

Petitioner, Francis P. Tracey, appealed his convictions to the United States Court of Appeals for the First Circuit (*United States* v. *Tracey*, 675 F.2d 433 (1st Cir. 1982)). Petitioner's convictions were affirmed by the Court of Appeals in an opinion authored by Circuit Judge Bownes, on April 15, 1982.

Petitioner, Francis P. Tracey, continuing to protest his innocence, subsequently filed a Motion, pro se, under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody, on September 29, 1983 in the United States District Court for the District of Massachusetts. The petition was dismissed, without having been referred to a Magistrate for consideration or any hearing whatsoever, by order of District Court Judge A. David Mazzone on November 7, 1983.

On July 27, 1984, the United States Court of Appeals for th First Circuit (Circuit Judges Bownes, Breyer and Campbe.., entered an order affirming the judgment of the District Court. Petitioner, Francis P. Tracey's petition for rehearing was denied by the same Circuit Judges on September 11, 1984.

Petitioner has fully served his term of incarceration in Federal Prison flat, without consideration of parole, and has been discharged from confinement.

Statement of the Case

Petitioner Francis Tracey was convicted of income tax evasion on May 1, 1981 by a jury in Federal Court in Boston, Massachusetts. Francis Tracey did not take the stand in his behalf. The Government would want one to accept *United States* v. *Tracey* as a straight-forward income tax evasion case. But is it? Former United States Attorney Edward F. Harrington, at the time, was conducting an extensive investigation of the administration of Mayor Kevin H. White, Mayor of Boston. Petitioner Francis Tracey was a deputy commissioner of the City of Boston Real Property Department during this

period, from 1970 to 1978. The Real Property Board in Boston, was in charge of City-owned public parking lots and garages, which were leased to private companies. As the Deputy Commissioner, Francis Tracey supervised members of the Real Property Department who conducted inspections of the parking facilities and generally one could say that Francis Tracey was the overseer of said facilities.

After having spent most of his life in politics in City Hall in Boston, Francis Tracey, the record reflects, was close to the Mayor in Kevin White's Administration, a perfect target for former United States Attorney Edward F. Harrington.

The counts against Petitioner Francis Tracey relate to the taxable years 1975, 1976 and 1977 wherein the record shows that the Government alleges a total unreported taxable income of $39,983.48. The additional tax due was $15,951.74. The amount of taxable income was determined by the Government by using the "net worth and expenditures" method.

Under the "net worth and expenditures" method, the Government has to prove a likely source of taxable income or negate all nontaxable sources; it may introduce evidence of each. In *U.S.* v. *Tracey*, the Government proceeded along both lines of proof, and in so doing, the Government has 'over-egged the pudding' as it were, in the Government's efforts to 'convict' one of Mayor Kevin White's 'inner sanctum' members. See *Tracey* v. *U.S.*, 84-1100, at 3.

The record shows that 'Herculean efforts' were exerted by the Internal Revenue Service in a wide-spread investigation of all persons, business people and venders, with whom Petitioner Francis Tracey was in contact with on a normal basis in his activities with the City of Boston, as Deputy Commissioner of the Real Property Department; which investigations uncovered no sources of cash payments, and none of the businessmen nor vendors came forward with statements that they made cash 'payoffs' to Petitioner Francis Tracey for 'City

Hall' favors or as campaign contributions for ex-Mayor Kevin H. White of Boston. Then former United States Attorney Edward F. Harrington introduced the allegations of one Francis X. Green.

The record shows that the Government's alleged proof of a likely source of income consisted in the testimony of one witness, Mr. Francis X. Green, and one witness only, who the Court of Appeals for the First Circuit called a 'key' and 'crucial' prosecution witness (*U.S.* v. *Tracey*, 675 F.2d at 438, footnote 1). Quoting the Court: "We note our belief that the witness was an important factor in appellant's (Francis Tracey) conviction. The Government contends, given its two-pronged method of proving appellant's unreported taxable income and the relevance of Mr. Green's testimony to only one prong, that Mr. Green was not a crucial witness. *We do not agree.* (Emphasis added)."

The record shows that Mr. Green testified that he had paid bribes to Petitioner Francis Tracey during the time that Mr. Green leased parking facilities from the City of Boston. Mr. Green himself, was under investigation by the United States Attorney's Office and the Federal Bureau of Investigation on several fronts, the least of which were Income Tax Evasion, Withholding Tax Evasion, both State and Federal, an arson investigation into a fire that reduced Mr. Green's personal residence, which was heavily endowed with fire insurance, to ashes, a mail fraud investigation in relation to fire insurance application, a bank robbery at the Liberty Bank in Massachusetts, and misapplication of Federally insured bank funds.

Petitioner Francis Tracey has learned that Mr. Green received "pocket immunity" from former United States Attorney Edward F. Harrington, a fact that not only was not revealed to the jury in *U.S.* v. *Tracey* at the time of trial, but was specifically denied by the Government and Mr. Green, who perjured himself in the same area.

The record reflects:

Q. Now, (Mr. Green) the federal government has paid your travel expenses in connection with the various appearances you have had to make, you have indicated that on cross examination, haven't you?

Mr. Francis X. Green answered:

A. Yes.

Q. The federal government has also paid your room and board, your subsistence when you have been required to stay overnight someplace, hasn't it?

A. Yes.

Q. In fact, Mr. Green, you haven't lived in the Boston area since late 1978, have you?

A. No, I'm not sure of the date, but it's been a few years, yes.

Q. And so you have had to travel on various occasions to come to court proceedings and so forth?

A. Yes.

Q. And the government reimbursed you for out-of-pocket expenses?

A. Yes.

Q. And you also received the standard statutory witness fee that all witnesses and jurors and everybody else received, haven't you, sir?

Mr. Sullivan: Objection.

The Court: That may stand.

A. Yes.

The Court: You received a witness fee for your appearance here?

The Witness: Yes.

Q. Over and above those amounts, Mr. Green, the travel reimbursement and standard fee, has the Government paid you any money at all for your cooperation and testimony?

A. Absolutely not.

Q. Has the Government paid you one dollar?

A. No.

Q. One cent?

A. No.

Q. Has the federal government promised you any benefits if you testified, Mr. Green?

A. No.

Q. *Did the federal Government grant you immunity from prosecution?*

A. *No.*

Q. As far as you are concerned, the Federal Government could prosecute you on anything that you have said?

Mr. Sullivan: Objection.

The Court: No. Overruled. You may answer.

A. Yes.

Q. As far as you are concerned, is that correct sir?

A. I hope not, but I am sure they could.

Q. *Because you haven't been made any promises, have you, Mr. Green?*

A. No.

Q. One point late yesterday afternoon, I believe, Mr. Sullivan asked you if you had lied to Commissioner Provo at one point to try and get your second abatement approved. And you indicated, I believe your response was yes, you had.

Do you remember that?

A. Yes.

Q. And I believe the next question was, so you lied for your own personal benefit to help yourself out and you said yes.

Do you remember that?

A. Yes.

Q. Let me ask you this, sir: With respect to this case and this testimony, do you have any personal benefit or

personal stake in the outcome of this case?

A. Absolutely not.

Mr. Sullivan: Objection.

The Court: No. Let it stand.

Q. Do you have any personal benefit or stake?

A. Absolutely not.

The record reflects that Mr. Francis X. Green, ostensibly without funds and without gainful employment, noticed an advertisement for leaseholds for public garages as offered by the City of Boston. Without any prior garage ownership experience, and without funds, Mr. Green formed an alliance of friends and made a bid on a City of Boston garage lease. In the summer of 1974 Mr. Green was awarded two leases for City-owned parking facilities on which he had bid. That autumn Mr. Green won another lease and in early 1975 another. The leases ran for a period of one year with rent payable monthly. At the outset of one of his first leases, Mr. Green was allegedly approached by Petitioner Francis Tracey and told to continue the former tenant's practice of allowing certain individuals to park free. Mr. Green agreed, as he testified, he wanted to be on good terms with the City of Boston.

Mr. Green testified that he now went from "dime time to prime time", becoming wealthy from the operation of the parking facilities, which, as he stated, could only happen in America.

Three of the garages leased by Mr. Green were multi-storied and elevator-operated. According to Mr. Green, the elevators broke down frequently and were a constant problem. In the spring of 1975 Mr. Green requested from the Real Property Board a rent abatement of approximately $125,000.00 to cover the cost of repairs to the elevators. While the abatement was still pending, Mr. Green allegedly was told by a parking lot inspector that Petitioner Francis Tracey wished to meet with him. The alleged meeting was arranged and, in a parking lot under City Hall, Francis Tracey allegedly asked Mr. Green to

contribute $10,000.00 to Boston Mayor Kevin H. White's campaign for re-election, telling him that such a campaign contribution would be advantageous to Mr. Green. Mr. Green testified that he gave petitioner Francis Tracey $6,000.00.

In October 1975 the Real Property Board granted Mr. Green a rent abatement of approximately one-half of the amount that he requested.

During the autumn of 1975, when one of Mr. Green's leases was about to expire, Mr. Green testified that he made an arrangement with Francis Tracey to pay Francis Tracey payments of $500.00 weekly in lieu of rent to the City of Boston. Allegedly Mr. Green made eight or ten payments to Petitioner Francis Tracey into early 1976, until Mr. Green received notice from the City of Boston that Mr. Green was in arrears in his rental payments. In July the City of Boston forbade Mr. Green and his various companies from bidding on any more leases for parking facilities and subsequently filed suit against Mr. Green for back rent due the City of Boston.

As stated, the Government would want one to view the instant matter as a straightforward tax evasion prosecution. However, Petitioner Francis Tracey was faced with a 'Hobson's Choice' at trial: to take the witness stand in his own behalf and defend himself and thusly 'open the door' to bring into the trial, which received wide publicity in the Press and Television Media, the name of Mayor Kevin H. White, the real 'target' of the United States Attorney's Office, and the many opportunities to embarrass the Mayor; and in so taking the stand to vindicate himself in the face of the false allegations of the Government's one 'key' and 'crucial' prosecution witness, Mr. Green; or remain silent and trust in the anticipated good sense of the jury.

Petitioner, Francis Tracey, had for some 37 years of political life with City Hall in the City of Boston lived rather frugally, having no immediate family, finding it hard to even 'pick-up his own check' in a Boston restaurant due to his many

political 'Irish' friends, being able to set aside a great deal of funds over the years from his City Hall salary, and having grown-up in Boston in a strict Irish household and through the depths of the Great Depression, was not exactly trustful of banks.

In 1975, Petitioner Francis Tracey received confidential input with his physicians that the long term prognosis of his medical condition was at best guarded and that there was a possibility of a recurrence of his attendant affliction. Petitioner Francis Tracey at that time determined to change his life style and enjoy life more for the moment instead of constantly saving his dollars for his old age retirement. Petitioner spent more freely from his cash reserves, which he had put aside from his years of salaried employment, which purchases included a new Cadillac and vacation trips.

The question is whether a jury might reach a different verdict if Petitioner were granted a new trial with Petitioner Francis Tracey being free to take the stand in his own defense to explain his apparent increase in wealth, confirmed by the testimony of his physicians and the jury's knowledge that the government's one and only 'key' and 'crucial' prosecution witness had been promised 'pocket-immunity' and been provided for with cash allowances and a 'new start' in business by the Government in return for his cooperation in *U.S.* v. *Tracey*.

The jury convicted Petitioner Francis Tracey on all counts, and he received a sentence of 18 months incarceration in a Federal Prison, which sentence he served flat without parole. Petitioner persisting in his innocence, now brings the instant proceedings as a collateral attack on his conviction and to correct a miscarriage of justice, granted that innocence, in light of *Bean*, is not guaranteed by the Constitution of the United States. *Bean* v. *United States*, 679 F.2d 683 (1982).

In light of what Petitioner Francis Tracey has seen during his 18 months of incarceration, especially while assigned to the

Federal Prison library, sometimes the Government is wrong, in particular the Internal Revenue Service. See *United States* v. *Sells Engineering*, __ U.S. __, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983); also *United States* v. *Baggot*, __ U.S. __, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983). See also Friendly, *"Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,"* 38 University of Chicago Law Rev. 142, 151 (1970). See also Donnelly, *"Unconvicting the Innocent"*, 6 Vand. Law Review, 20, 33-38 (1952).

Reasons for Granting the Writ

A. THE COURT OF APPEALS DECISION THAT PETITIONER WAS NOT ENTITLED TO § 2255 RELIEF WITHOUT BEING AFFORDED A HEARING EVEN THOUGH PETITIONER'S § 2255 MOTION, AFFIDAVITS AND FILINGS RAISED GENUINE CONTROVERTED ISSUES OF FACT WHICH IF PROVEN TRUE ENTITLED PETITIONER RELIEF WHICH DECISION IS IN CONFLICT WITH CONTROLLING CASE LAW OF THIS COURT AND OTHER CIRCUITS.

This Court, in *Machibroda* v. *United States*, 368 U.S. 487, 7 L.Ed.2d 472, 82 S.Ct. 510, said:

> "We think the District Court did not proceed in conformity with the provisions of 28 U.S.C. § 2255, when it made findings on controverted issues of fact without notice to petitioner and without a hearing. *United States* v. *Hayman*, 342 U.S. 205, 220, 96 L.Ed. 232, 242, 72 S.Ct. 263. The statute requires a District Court to *'grant a prompt hearing'* when such a motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' "

Petitioner Francis Tracey raised on appeal with the United States Court of Appeals for the First Circuit the point that Petitioner had alleged in his § 2255 filing and set forth in the supplemental motions and affidavits placed before the court that former United States Attorney Edward F. Harrington, and therefore the Government, in the prosecution of *U.S.* v. *Tracey*, had induced the one and only 'key' and 'crucial' prosecution witness, Mr. Francis X. Green, to give perjured testimony at Petitioner's trial, in that Mr. Green was induced to make false allegations of having made 'cash payoffs' to Petitioner in the form of cash campaign contributions to the Mayor Kevin H. White "coffers" (Mayor Kevin H. White being the former Mayor of the City of Boston); and that the testimony of Mr. Green of the alleged payoffs to Petitioner Francis Tracey was the 'lynchpin' testimony in the Government's case against Petitioner; that further the former United States Attorney Edward F. Harrington, thusly the Government, executed an affidavit denying that he knew Mr. Francis X. Green other than having met him once or twice, during a political election, which affidavit was executed knowingly to be false; further that witnesses are now willing to come forward to testify for Petitioner as to the falsity of Mr. Edward F. Harrington's affidavit, which witnesses were not available at the time of Petitioner's trial below and were unknown to Petitioner at the time of his trial below.

The point being, that had this evidence been available to Petitioner at the time of his trial below, and in the event that Petitioner Francis Tracey be granted a new trial, a jury having this evidence before it would arrive at a different conclusion.

These incidents of the chief prosecutor's impropriety prior to, during and after Petitioner's trial in the court below have so infected Petitioner's entire trial process, that if proven true at Petitioner's hearing in open court, would render Petitioner's entire trial process unfair and unjust reaching Constitutional stature and the Court should take 'judicial notice' of the impropriety so as to grant Petitioner a new trial.

The prosecutorial misconduct alleged is of such nature that it goes beyond the pale, and in all Petitioner's pleadings it is difficult to see how the court can 'blink' at the magnitude of the prosecutorial misconduct.

This Court in *Blackledge* v. *Allison*, stated:

> "that if true the allegations in his petition entitled him to relief; and that he deserved a chance to establish their truth." *Blackledge* v. *Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

There appears to be a conflict among the Circuits as to when and indeed, if at all, an evidentiary hearing should be held in a § 2255 filing, and since *United States* v. *Hayman*, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952), wherein this Court has held that the § 2255 motion was more appropriately held to be analogous to the federal writ of habeas corpus, a habeas filing as well.

The United States Court of Appeals for the First Circuit has set a new course in § 2255 proceedings in its opinion in *United States* v. *DiCarlo*, 575 F.2d 952 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978), that a hearing is not necessary in § 2255 proceedings. It is well to note that *DiCarlo* was construed as a § 2255 filing by the First Circuit, wherein the case presented was actually a motion for a new trial, and its comments in *DiCarlo* should be read in this light.

The various Sister Circuits have been at variance as to just what is required for a mandatory evidentiary hearing to be required in a habeas filing wherein a hearing was not heard below.

The Fifth Circuit in *United States* v. *Auten*, 632 F.2d 478 (5th Cir. 1980) has affirmed what this Court has stated in *Machibroda* v. *United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); genuine issues of material fact which are controverted may not be resolved without a hearing.

The Seventh Circuit, in *Stokes* v. *United States*, 652 F.2d 1 (7th Cir. 1981), held that in the face of a genuine factual

dispute, the failure to conduct an adversary hearing constituted reversible error.

The Ninth Circuit in *Brown* v. *United States*, 623 F.2d 54 (9th Cir. 1980) ruled an evidentiary hearing on the motion to determine the facts was required and reversed.

In *Alford* v. *United States*, 709 F.2d 418 (5th Cir. 1983), the Fifth Circuit stated that although the public has an interest in the efficient administration of justice, criminal defendants have a right to a fair hearing (in a § 2255 petition).

In *United States* v. *Baynes*, 622 F.2d 66 (3rd Cir. 1980), the Third Circuit held in a case of a pro se defendant that the District Court erred in not conducting a hearing to make findings of fact in a § 2255 motion.

In *United Staes* v. *Hearst*, 638 F.2d 1190 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 1018 (1981), the Ninth Circuit ruled that the District Court erred and must hold a hearing to determine an issue of fact which was disputed.

In *Mack* v. *William French Smith, United States Attorney General*, 659 F.2d 23 (1981), the Fifth Circuit ruled in the matter of a § 2255 petitioner filing pro se, that the District Court erred in not holding an evidentiary hearing wherein petitioner claimed the prosecution knew of perjured testimony introduced at his trial, while the District Court, as in the instant case, found such allegation as conclusory. The Fifth Circuit found that where Mack would be entitled to post-conviction relief if his allegations were proven true, a § 2255 motion requires an evidentiary hearing on those allegations. See also, *Friedman* v. *United States*, 588 F.2d 1010 (5th Cir. 1979); *Powers* v. *United States*, 446 F.2d 22 (5th Cir. 1971); See also, *Atilus* v. *United States*, 406 F.2d 694 (5th Cir. 1969).

Petitioner Francis Tracey has alleged in his § 2255 filing and set forth in the supplemental motions placed before the court that former United States Attorney Edward F. Harrington, and therefore the prosecution in *U.S.* v. *Tracey*, did induce Mr. Francis X. Green, the one and only 'key' and 'crucial'

prosecution witness at Petitioner's trial below, to make perjured allegations of having made 'cash payoffs' to Petitioner Francis Tracey in the form of cash campaign payments to the Mayor Kevin White 'coffers'; and that the testimony so introduced with the knowledge of the prosecution that said testimony was perjured and that the testimony was the 'lynchpin' in the Government's case against Petitioner; further that the former United States Attorney Edward F. Harrington then executed an affidavit denying that he knew Mr. Francis Green other than having met him once or twice, which affidavit was executed knowingly to be false; that witnesses are now willing to come forward to testify of the falsity of Mr. Harrington's affidavit, which witnesses were unknown to Petitioner at the time of his trial below; and the most important factor, that had this evidence been available to the jury at the time of Petitioner's trial below, the jury would not have believed the Government's theory of the case for the prosecution and would have arrived at a different verdict.

In a similar case, the Second Circuit reversed a lower court dismissal of a habeas petition, in *Taylor* v. *Lombard*, 606 F.2d 371 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

In *Taylor* v. *Lombard*, a defendant appealed dismissal of his habeas petition, claiming that prosecution witnesses at his assault trial had perjured themselves with the prosecutor's knowledge. The Second Circuit reversed, noting initially that it was not bound by the "clearly erroneous" standard of review but could make its own independent factual determinations since the district court's findings were based on reviewing the state court record without a hearing. The Second Circuit held that the prosecutor's knowing use of perjured testimony violated the Due Process Clause of the Fourteenth Amendment. A claimed error of constitutional magnitude must be examined to determine whether it affected the fairness of the defendant's trial. The court concluded in this case, if the truth had been told, the credibility of the prosecutor's witnesses

would have been shaken and, in fact, would have tended to corroborate the defendant's version of the facts. *Taylor* v. *Lombard*, 606 F.2d 371 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

Petitioner Francis Tracey has at all times, as in the case of the instant petition, been filing *pro se*, without the assistance of such Constitutional luminaries as Mr. Harvey Silverglate or Mr. Alan M. Dershowitz.

With deference to the court, I would like to take a quote from Mr. Alan M. Dershowitz:

> "Prosecutors are supposed to be interested in justice: the motto on the wall of the Justice Department proclaims that the government 'wins its point whenever Justice is done.'
>
> But in real life, many prosecutors reverse the motto and believe that justice is done whenever the government wins its point. Prosecutors want to win especially when a guilty defendant tries to get off because of some governmental misconduct—a 'technicality.'
>
> In such cases the law demands acquittal.

As Justice Oliver Wendell Holmes put it:

> "It is less evil that some criminals should escape than that the government should play an ignoble role."
>
> BEST DEFENSE, Alan M. Dershowitz, 1982.

The Courts have consistently ruled that:

> "*Pro se* petitions should be read liberally."
>
> *McNair* v. *McCune*, 527 F.2d 874 (4th Cir. 1975); se also, *Miller* v. *United States*, 564 F.2d 103 (1977).

One of the main objections by district courts to holding hearings in habeas filings is that the person filing such applications by far, is a prisoner being incarcerated at the time of the filing, and that prisoners would have to be transported to the

courts at great expense and inconvenience to the Government. See *Carvell* v. *United States*, 173 F.2d 348. Not so in the instant case, as Petitioner Francis Tracey has served his sentence and lives in the district court area. The § 2255 Rules afford means whereby the petitioner is not required at a hearing, as this Court is well aware, perhaps through discovery, as in the provision of Rule 6 of the § 2255 Rules, the presence of the prisoner at a habeas hearing may not be necessary. See *Machibroda* v. *United States*, 368 U.S. 487.

In the instant case, Petitioner Francis Tracey requested an opportunity for discovery so as to obviate a hearing, as under Rule 6, and he was denied by the district judge. *Pro se* pleadings are to be held to a "less stringent standard than formal pleadings drafted by lawyers." See *Haines* v. *Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1971).

This Court further stated:

> Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (quoting *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

The United States Court of Appeals for the First Circuit erred in deciding *Tracey* v. *United States*, 84-1100 (1st Cir. 1984) in that, affidavits in a § 2255 filing may not be used to resolve a factual dispute, as in the instant case. See *Friedman* v. *United States*, 588 F.2d 1010 (5th Cir. 1979); *Lindhorst* v. *United States*, 585 F.2d 361 (8th Cir. 1978); *Johnson* v. *United States*, 567 F.2d 634 (5th Cir. 1978); *Miller* v. *United States*, 564 F.2d 103 (1977); *Montgomery* v. *United States*, 469 F.2d 148 (5th Cir. 1972); *Brown* v. *United States*, 462 F.2d 681 (5th Cir. 1972); *Blackledge* v. *Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977); See also Advisory Committee Note to Rule 7, Rules Governing Section 2255 Proceedings.

When a pro se petitioner makes allegations that, if proved true, would entitle him to habeas corpus relief, he should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of counter affidavits conclusively proving their falsity. See *Blackledge* v. *Allison*, 431 U.S. 63, 52 L.Ed.2d at 145, 97 S.Ct. 1621; see also *Evans* v. *Eyman*, 363 F.2d 540 (9th Cir. 1966); also see *Moran* v. *Hogan*, 494 F.2d 1222 (1974).

This Court, in *Machibroda*, further stated in an opinion authored by Justice Stewart:

> "There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. § 2255 can be served in this case only by affording the hearing which its provisions require.
>
> Vacated and remanded."
>
> *Machibroda* v. *United States*, 368 U.S. 487, 7 L.Ed.2d 473, 82 S.Ct. 510.

This Court in *Blackledge* v. *Allison* stated:

> "Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees.
>
> *Harris* v. *Nelson*, 394 U.S. 286, 290-291, 22 L.Ed.2d 281, 89 S.Ct. 1082.
>
> 'The Writ of *habeas corpus* has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal freedom.'
>
> *Price* v. *Johnston*, *supra*, at 269, 92 L.Ed. 1356, 68 S.Ct. 1049.

"And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody."

Blackledge v. *Allison*, 431 U.S. 63, 52 L.Ed.2d 136, 97 S.Ct. 1621.

"The critical question is whether these allegations, when viewed against the record of the plea hearing, were so 'palpably incredible', *ibid.*, so 'patently frivolous or false', *Herman* v. *Claudy*, 350 U.S. 116, 119, 100 L.Ed. 126, & 6 S.Ct. 223, as to warrant summary dismissal. In the light of the nature of the record . . . we conclude that Allison's petition should not have been summarily dismissed."

Blackledge v. *Allison*, 431 U.S. 63, 52 L.Ed.2d 136, 97 S.Ct. 1621.

B. THE COURT OF APPEALS' DECISION THAT PETITIONER WAS NOT ENTITLED TO 28 U.S.C. § 2255 HABEAS RELIEF DESPITE THE PROSECUTORIAL MISCONDUCT OF THE GOVERNMENT IN KNOWINGLY USING PERJURED TESTIMONY AND CONTINUED IMPROPRIETY IS CONTRARY TO THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, THE SIXTH AMENDMENT'S GUARANTY OF A FAIR TRIAL PROCESS AND THE FOURTEENTH AMENDMENT'S DUE PROCESS GUARANTY TO A FAIR TRIAL.

Prosecutorial misconduct mars any trial in which it occurs and gives grounds for appeal. See *United States* v. *Beckett*, 706 F.2d 519.

The allegation has been raised that perjured testimony of the Government's one and only 'key' and 'crucial' witness was introduced at petitioner's trial below and that said testimony was introduced through the cooperation of the former United States Attorney Edward F. Harrington. Further, that Mr. Harrington granted the same witness, Mr. Francis Green,

'pocket-immunity', which fact was kept from Petitioner's jury at time of the trial below, and in fact Mr. Green denied from the stand that he was granted immunity.

The law is quite clear that "in order to vacate the judgment and sentence on use of perjured testimony, two elements must first be established: first, the use of the perjured testimony, and second, knowledge by the prosecuting officials at the time the perjured testimony was used that it was perjured." See *Holt* v. *United States*, 303 F.2d 791, 794 (8th Cir.), *cert. denied*, 372 U.S. 970, 83 S.Ct. 1095, 10 L.Ed.2d 132 (1972) citations omitted. See also *Hallman* v. *United States*, 490 F.2d 1088 (8th Cir. 1973); *United States* v. *Conzemius*, 611 F.2d 695 (8th Cir. 1979).

The duty of the United States Attorney is to execute his office according to the highest ethical precepts and to avoid even the appearance of besmirching the trial process. See *Riviera* v. *United States*, 318 F.2d 606 (9th Cir. 1963); also see *United States* v. *Beckett*, 706 F.2d 519. Perjury upon the part of a Government witness should not be tolerated, and demands the granting of a new trial. See *Sutton* v. *United States*, CA, 33CrL 4116 (July 27, 1983). See also *United States* v. *Imbruglia*, 617 F.2d 1-5 (1st Cir. 1980).

Substantial new evidence has come to light since *United States* v. *Tracey*, 675 F.2d 438. Former United States Attorney Edward F. Harrington had executed an affidavit with the district court below that he did not know the Government's 'key' and 'crucial' witness, Mr. Francis X. Green. The record shows from motions on file with the court that further investigation has revealed that Mr. Harrington did know Mr. Green, and in fact that Mr. Green was actually a friend of Mr. Harrington and that Mr. Green had made the statement that he, Mr. Francis Green, worked undercover for Mr. Edward Harrington's office while Mr. Harrington was United States Attorney. Further, it has come to light that Mr. Harrington actually, after receiving a personal telephone call from

Mr. Green, went down to the Dedham, Massachusetts jail in the early hours of the dead of night to assist in bailing Mr. Green out of jail.

Had a jury in *United States* v. *Tracey* known these matters, they may have arrived at a different conclusion. The prosecution has an obligation not to let false evidence and perjured testimony go uncorrected at trial, even if the prosecution did not solicit it. See *Napue* v. *Illinois*, 350 U.S. 264.

Further, the prosecutor must reveal any known contrary statements of his own witnesses even though he may believe current testimony to be true. See *Giles* v. *Maryland*, 346 U.S. 66. Further, other favorable testimony must be proffered to the defense. See *Jackson* v. *Wainwright*, 390 F.2d 288 (5th Cir.). Also see, *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In *Mooney*, this Court said:

> Nondisclosure by the prosecution is a violation of due process:
>
> > "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Mooney* v. *Holohan*, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406.

This Court in *Pyle* said:

> "Petitioner's papers are inexpertly (pro se) drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the

> deliberate suppression by those same authorities of favorable evidence. These allegations significantly charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody." *Pyle* v. *Kansas*, 317 U.S. 213, 215, 216, 63 S.Ct. 177.

Further, it has been held that "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." See *Napue* v. *Illinois*, 360 U.S. 264, 269, 3 L.Ed.2d 1217, 1221, 79 S.Ct. 1173; See also, *Alcorta* v. *Texas*, 355 U.S. 28, 2 L.Ed.2d 9, 78 S.Ct. 103; also see *Wilde* v. *Wyoming*, 362 U.S. 607, 4 L.Ed.2d 985; Cf. *Durley* v. *Mayo*, 351 U.S. 277, 285, 100 L.Ed. 1178, 1185, 76 S.Ct. 806.

Justice Oliver Wendell Holmes has said:

> "In cases of Governmental misconduct — the law demands acquittal."

As such "the defendant is denied fundamental fairness." See *Meyer* v. *Estelle*, 621 F.2d 769 (5th Cir. 1980).

This Court has always held:

> "Stare decisis et non quieta movere."
> "To adhere to precedents and not to unsettle things which are established."

And what has become of the prosecution's one and only 'key' and 'crucial' witness Mr. Francis Green in Petitioner's trial below? The Government has miscued again. Mr. Green, having utilized the funding he received from the Government for his cooperation in *U.S.* v. *Tracey*, as 'seed' money for a 'business venture' in the State of Washington, was recently convicted of a massive fraud in Washington and is to enter prison in the State of Washington on November 9, 1984.

C. THE COURT OF APPEALS' DECISION THAT PETITIONER WAS NOT ENTITLED TO 28 U.S.C. § 2255 RELIEF IN VIEW OF THE FACT THAT THE COURT OF APPEALS DID NOT GIVE PETITIONER'S BRIEFS FULL AND FAIR CONSIDERATION IS CONTRARY TO ARTICLE 1, SECTION 9, PARAGRAPH TWO OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

It is respectfully submitted that the United States Court of Appeals for the First Circuit, either deliberately or inadvertently, in rendering its decision in Petitioner's appeal of denial of his 28 U.S.C. § 2255 motion for habeas relief did not fully treat, consider and properly air his briefs on appeal, and indeed may not even have bothered to read Petitioner's briefs, Petitioner at all times filing *pro se*, and in so doing the United States Court of Appeals for the First Circuit violated Petitioner's constitutional right of redress to the courts under habeas corpus, as specifically set forth and protected under the Constitution of the United States, Article 1, Section 9, Paragraph 2.

The United States Court of Appeals for the First Circuit, in a decision authored by Judge BOWNES, Circuit Judge, with Chief Judge CAMPBELL, and Judge BREYER, Circuit Judge, concurring, affirmed the decision of the lower court in a nine page opinion handed down July 27, 1984. (See Appendix A)

Page number 4 (A-5) of the opinion in the instant appeal which was authored by Judge BOWNES, Circuit Judge, states in part:

> "On appeal, the petitioner asserts six reasons for vacating or setting aside the sentence: (1) the government unconstitutionally denied him exculpatory evidence; (2) he was a victim of selective prosecution; (3) the government deprived him of a fair trial through the United States Attorney's failure to disclose certain information in the post-conviction proceedings; (4) his sixth amendment rights were violated due to the restricted cross-examina-

> tion of the key witness, Francis X. Green; (5) his sentence was based on materially false and prejudicial information in his presentence report; (6) his conviction was obtained through Green's perjured testimony."

The opinion as handed down by the United States Court of Appeals for the First Circuit is false, and actually is merely a paraphrase of the Government's response to the original petition filed in the lower court and the November 7, 1983 response of the District Judge. The opinion handed down does not in any way reflect the issues presented for review or the points raised on appeal by Petitioner and it is almost as though the Court of Appeals treated Petitioner's Briefs with disdain, not even to have bothered to read Petitioner's Briefs since they were submitted *pro se*, as how else can the Court of Appeals reconcile the draft of their opinion? Further, to complicate matters, the Court of Appeals did not even trouble itself to rewrite the opinion when the error was called, respectfully, to their attention by Petitioner in the content of Petitioner's application for a rehearing before the same panel of three Circuit Judges.

The opinion handed down by the Court of Appeals mimics the motion in opposition as submitted by Mr. Mark Wolfe, Assistant United States Attorney, for the Government on October 31, 1983, as though the person who drafted the recent opinion relied wholly on the Government's response and went no further, not even to bother to read Petitioner's Briefs.

Petitioner Francis Tracey is well aware of the feeling of certain Federal Judges in regards to pro se filings, and one hopes that the First Circuit does not go as far as Chief Judge Frank McGarr of Illinois who was widely quoted in the media at, I believe, a law banquet wherein his address and for the record, he characterized individuals (prisoners and others) who filed pro se in Federal Courts as "psycopaths" who clog "the Federal Court dockets."

Petitioner Francis Tracey in his appeal No. 84-1100 before the United States Court of Appeals for the First Circuit of denial of 28 U.S.C. § 2255 habeas relief in the court below, only three points on appeal. On appeal, Petitioner really only raised the following points: (1) that the lower court erred in not holding a hearing to resolve the genuine issues of fact raised which were controverted in the affidavits and motions filed; (2) that the district judge should have recused himself and assigned the § 2255 petition to another judge or magistrate since Petitioner filed an affidavit of bias; and (3) Petitioner's Due Process Rights under the Fifth Amendment and right to a fair trial under the Sixth Amendment were violated by the Government's misconduct in knowingly producing a 'key' and 'crucial' witness who gave perjured testimony and keeping it secret that its 'key' witness had been granted 'pocket-immunity' and had been 'funded for a new start' for his cooperation to the prosecution, which prosecutorial misconduct infected Petitioner's entire trial process.

Several of the points asserted in the Court of Appeals opinion were never even raised on appeal by Petitioner.

This conduct goes beyond the pale and it would be difficult for the Court to 'blink' at such action, which goes to the fairness and justice of Petitioner's right to have his appeal heard, far beyond the 'fair play' of our Judicial System.

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS P. TRACEY, *pro se*
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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 84-1100

FRANCIS P. TRACEY,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID A. MAZZONE, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BOWNES AND BREYER, *Circuit Judges*.

Francis P. Tracey, pro se.
Thomas J. Curley, Jr., Assistant U.S. Attorney. and *William F. Weld*, United States Attorney, on brief for appellee.

July 27, 1984

BOWNES, *Circuit Judge*. This is an appeal from the district court's denial, without hearing, of a 28 U.S.C. § 2255 motion.[1] Petitioner-appellant, Francis P. Tracey, was convicted by a jury on three counts of income tax evasion in violation of 26 U.S.C. § 7201 and three counts of filing false income

[1] 28 U.S.C. § 2255 reads:

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order on the motion as from the final judgment on application for writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

tax returns in violation of 26 U.S.C. § 7206(1). Petitioner appealed, and the conviction was affirmed. *United States* v. *Tracey*, 675 F.2d 433 (1st Cir. 1982). Tracey was sentenced to eighteen months in federal prison and ordered to pay a total fine of $15,000. The 2255 motion was filed *pro se* on September 29, 1983; Tracey was released from prison the next day, September 30, 1983.[2] We affirm.

The motion was assigned to the same district court judge who presided at petitioner's trial. He ordered the government to file a responsive pleading. The government complied. By memorandum and order of November 7, 1983, the district court dismissed the petition without a hearing. Petitioner then filed a series of motions for reconsideration. He moved for reconsideration of the court's order; the government replied in opposition, and the motion for reconsideration was denied. Petitioner then filed a special motion for reconsideration that was also denied. Finally, another special motion for reconsideration was filed and denied without argument.

On appeal, petitioner asserts six reasons for vacating or setting aside the sentence: (1) the government unconstitutionally denied his exculpatory evidence; (2) he was a victim of selective prosecution; (3) the government deprived him of a fair trial through the United States Attorney's failure to disclose certain information in the post-conviction proceedings; (4) his sixth amendment rights were violated due to the restricted cross-examination of the key government witness, Francis X. Green; (5) his sentence was based on materially false and prejudicial information in his presentence report; (6) his conviction was obtained through Green's perjured testimony.

---

[2] The government has not suggested that the case is moot. *See United States* v. *Correa-DeJesus*, 708 F.2d 1283 (11th Cir.), *cert. denied*, 104 S. Ct. 530 (1983); *United States* v. *Hay*, 702 F.2d 572, 573 (5th Cir. 1983); *Courtney* v. *United States*, 486 F.2d 1108, 1109 n.1 (9th Cir. 1973); *Reed* v. *United States*, 471 F.2d 721, 722 (5th Cir. 1973); *Marshall* v. *United States*, 465 F.2d 966, 967 (9th Cir. 1972).

Before turning to these contentions, we first note that petitioner raises an issue on this appeal that was not part of his original 2255 motion. He argues that the district court judge, Mazzone, J., who tried the case should not have also decided the 2255 motion.

Petitioner claims that because the judge was familiar with the case, he had already made up his mind about the outcome of the motion and should have recused himself. In support of this position, he cites to our opinion in *Halliday* v. *United States*, 380 F.2d 270 (1st Cir. 1967), *cert. denied*, 395 U.S. 971 (1969). *Halliday*, however, is inapposite. The question in that case was whether the same district judge who had accepted pleas of guilty without making any inquiry as to the voluntariness of the pleas or the defendant's understanding of the nature of the charges could decide a 2255 motion requesting a change of pleas on the grounds that the judge had violated Federal Rule of Criminal Procedure 11 in failing to make the inquiry. The motion asserted that in pleading guilty the defendant had been confused and did not understand to what he was pleading guilty. We held that it was not proper for the same judge to review the correctness of his own determination. *Id.* at 272. We specifically stated, however: "This interdiction does not mean that the sentencing judge cannot review a § 2255 petition to conclude, if appropriate, that no evidentiary hearing is required." *Id.* at 274.

Petitioner has alleged no facts on which a claim of bias or prejudice by the judge could be based. *See* 28 U.S.C. §§ 144, 455. We must also note that petitioner's claim of judicial bias came after his 2255 motion and subsequent motions for reconsideration were denied. In *Halliday*, the motion for recusal accompanied the filing of the 2255 motion.

Finally, and quite significantly, we point to Rule 4(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts, which the district court judge followed:

Rule 4. Preliminary Consideration by Judge

(a) Reference to judge; dismissal or order to answer. *The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him*, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business. [Emphasis added.]

Petitioner's claims of denial of exculpatory evidence, denial of a fair trial, violation of his sixth amendment right to full cross-examination and that his conviction was obtained through perjured testimony are all based on the testimony of the government's chief witness, Francis X. Green, and Green's alleged relationship with the United States Attorney at the time of the trial. Although the nomenclature was different, the subject matter of these claims was considered and rejected by us in the original appeal, *United States* v. *Tracey*, 675 F.2d 433, and we will not reconsider them. Issues disposed of on a prior appeal will not be reviewed again by way of a 2255 motion. *Dirring* v. *United States*, 370 F.2d 862 (1st Cir. 1967). "Absent an intervening change in the applicable law, issues that have been raised and decided on a motion for a new trial cannot be reconsidered in a subsequent collateral attack." *United States* v. *Sanders*, 723 F.2d 34, 36 (8th Cir. 1983). *See also United States* v. *Orejuela*, 639 F.2d 1055, 1057 (3d Cir. 1981); *Chin* v. *United States*, 622 F.2d 1090, 1092 (2d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981); *United States* v. *Natelli*, 553 F.2d 5, 7 (2d Cir.), *cert. denied*, 434 U.S. 819 (1977); *United States* v. *Romano*, 516 F.2d 768, 771 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975).

Petitioner's claims that his presentence report contained false, erroneous and prejudicial material were also considered and rejected by us in the first appeal. *United States* v. *Tracey*, 675 F.2d at 440-41. There is no need to cover this ground again.

Finally, we turn to the only claim not raised directly or indirectly on the first appeal, selective prosecution. This was raised for the first time in petitioner's 2255 motion. Under Federal Rule of Criminal Procedure, 12(b)(1), and 12(f),[3] petitioner waived the right to raise the selective prosecution defense when he did not, as the rule mandates, raise it prior to trial.

Moreover, it is clear that there is no substantive basis to this claim. The law on selective prosecution is well settled in this circuit:

> When, considering an attack on the Government's exercise of its broad discretion in the decision whether to prosecute a particular case, we presume that that choice has been made in good faith for reasons of sound governmental policy. *See United States* v. *Lichenstein*, 610 F.2d 1272, 1281 & n.4 (5th Cir.), *cert. denied*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980); *United States* v. *Union Nacional de Trabajadores*, 576 F.2d 388, 395 (1st Cir. 1978). To overcome this presumption, defendants bear a heavy burden. Only if a defendant can establish *prima facie*

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[3] Federal Rule of Criminal Procedure 12 reads in relevant part:

(b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

. . . .

(f) *Effect of Failure To Raise Defenses or Objections.* Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights[,]
>
> does the burden shift to the government to demonstrate that the prosecution was not premised on an invidious objective. *United States* v. *Union Nacional de Trabajadores*, 576 F.2d at 395, *quoting United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

United States v. *Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981).

No facts have been alleged by petitioner tending to show that other individuals similarly situated have not been prosecuted because of the same type of conduct. To the contrary, we take judicial notice that since petitioner's trial at least five officials of the City of Boston have pled guilty or have been convicted of various federal offenses in this district.[4] The presumption that the government's decision to prosecute was made in good faith easily withstands the petitioner's challenge.

Because the 2255 motion was, with one meritless exception, merely a rehash of the first appeal, there was no need for a hearing by the district court judge.

Affirmed.

---

[4] *United States* v. *Miller*, Crim. No. 83-192-K (D. Mass. filed November 16, 1983). *United States* v. *Rendini*, Crim. No. 83-0081-MA (D. Mass. filed July 1, 1983); *United States* v. *McNeill*, Crim. No. 82-0330-K (D. Mass. filed April 26, 1983), *aff'd* No. 83-1324 (1st Cir. February 13, 1984); *United States* v. *Williams*, Crim. No. 81-393 (D. Mass. filed March 31, 1982); *United States* v. *Collatos*, Crim. No. 81-365 (D. Mass. filed March 19, 1982).

United States Court of Appeals
For the First Circuit

No. 84-1100.

FRANCIS P. TRACEY,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: July 27, 1984

This cause came on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: the judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: RICHARD W. GORDON
Chief Deputy Clerk

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 84-1100

FRANCIS P. TRACEY,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

Before
CAMPBELL, *Chief Judge*,
BOWNES and BREYER, *Circuit Judges*.

ORDER OF COURT
Entered: September 11, 1984

Upon consideration of appellant's "Petition for Rehearing", It is ordered that said petition be and the same hereby is denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

B-2

United States Court of Appeals
For the First Circuit

No. 84-1100.

FRANCIS P. TRACEY,

PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,

DEFENDANT, APPELLEE.

ORDER OF COURT

Entered February 22, 1984

The United States moves to dismiss this appeal from the dismissal of a motion under 28 U.S.C. § 2255. It contends that the appeal time began on November 8, 1983 (when the dismissal was entered) and concluded 60 days later since the civil rules apply in this case. The notice of appeal filed on January 30, 1984 would thus be untimely.

Appellant points out, correctly, that he filed a motion in the nature of a Rule 59(e) F.R.Civ.P. motion within ten days of judgment. Under Rule 4(a)(4) F.R.A.P. the time for filing a notice of appeal did not begin to run until that motion was denied on December 2, 1983.

Therefore the appeal is timely and the motion to dismiss is denied.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

[cc: Mr. Tracey and Mr. Curley.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-2930-MA

FRANCIS P. TRACEY

v.

UNITED STATES OF AMERICA

ORDER OF DISMISSAL

MAZZONE, D.J.

In accordance with the Court's memorandum and order entered on November 7, 1983 on the motion under 28 U.S.C. §2255 to vacate, set aside, or correct sentence by a person in federal custody, it is hereby ORDERED that the above entitled action be and hereby is dismissed.

By the Court:

(s) HELEN M. COSTELLO
Deputy Clerk.

November 8, 1983

C-2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 83-2930-MA

FRANCIS P. TRACEY,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT.

MEMORANDUM AND ORDER

MAZZONE, D.J. November 7, 1983

This matter is before the Court on the plaintiff's motion under 28 U.S.C. §2255 to vacate, set aside, or correct sentence by a person in federal custody. The motion presents six grounds.

(1) *Failure To Disclose Exculpatory Evidence*

The record at trial shows the defendant had the evidence he claims was not disclosed, namely, the relationship between the key witness and the United States Attorney. He was allowed extensive examination on the relationship. There was no actual prejudice even if the information was not disclosed. *Frady* v. *United States*, 456 U.S. 152, 167-168 (1982).

(2) *Selective Prosecution*

This defense should be raised prior to trial. Fed.R.Civ.P. 12(f). In any event, the prosecutorial decision is presumed to have been made in good faith. The plaintiff has not overcome this presumption. *United States* v. *Saade*, 652 F.2d 1126 (1st Cir. 1981).

(3) *Failure To Disclose Further Evidence*

This ground relates to the failure of the government to disclose the fact that the key witness had worked for the United States Attorney during a political campaign in 1974. This matter was fully addressed on appeal and need not be considered anew. *United States* v. *Tracey*, 675 F.2d 433, 441-442 (1st Cir. 1982).

(4) *Restriction of Cross-Examination*

This ground was also addressed during trial and on appeal and requires no further discussion here. *United States* v. *Tracey*, at 437-439.

(5) *Improper Considerations In Sentencing*

The record does not show any improper considerations. The plaintiff had ample opportunity to speak, both for himself and through counsel. The pre-sentence report was reviewed and the plaintiff given the opportunity to correct any errors or omissions. The plaintiff has not shown that the sentence was based on improper considerations. *Brown* v. *United States*, 610 F.2d 672, 675 (9th Cir. 1980).

(6) *Perjured Testimony of Witness*

The plaintiff claims the key witness offered perjured testimony when he testified that he made payments to the plaintiff during a time when he was confined to the hospital or in Florida. This was presented at trial and its consideration was for the jury.

Conclusion

The plaintiff has failed to show, by a preponderance of the evidence, that he is entitled to an evidentiary hearing. *United States* v. *DiCarlo*, 575 F.2d 959 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978). On the record, it plainly appears that the movant is not entitled to relief and the motion is dismissed. Rule 4(b), Rules Governing Section 2255 Proceedings.

So Ordered.

(s) A. David Mazzone, *United States District Judge*

APPENDIX D

Constitutional Provision

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX E

Constitutional Provision

AMENDMENT VI

Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX F

CONSTITUTIONAL PROVISION

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

Constitutional Provision

ARTICLE 1, SECTION 9, ¶ 2

Article 1, Section 9, ¶ 2. The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public safety may require it.

Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-784

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANCIS P. TRACEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Appeal From the United States Court of Appeals
For the First Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER FRANCIS P. TRACEY

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-784

FRANCIS P. TRACEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Appeal From the United States Court of Appeals For the First Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER FRANCIS P. TRACEY

Argument

Pursuant to Rule 22, subsection .6, Petitioner, Francis P. Tracey, *pro se*, files a supplemental brief as provided by the Rules of the Supreme Court. The fundamental principle of a petition for a writ of habeas corpus is that "government must always be accountable to the judiciary for a man's imprisonment" and that the restraints on liberty must be removed if the imprisonment does not conform to the basic requirements of

law. *Fay* v. *Noia*, 372 U.S. 391, 401-402, 83 S.Ct. 822, 829, 9 L.Ed.2d 837 (1963). When the facts alleged in a habeas petition would justify relief if true, or when a factual dispute arises as to whether or not a constitutional right is being denied, the District Court must grant an evidentiary hearing. *Willis* v. *Ciccone*, 506 F.2d 1011, at 1016, 1019 (8th Cir. 1974). The instant petition and motions and affidavits accompanying thereto, set forth sufficient facts to permit the inference that petitioner, Francis Tracey, had been denied due process. See also, *Preiser* v. *Rodriguez*, 411 U.S. 475 at 484, 93 S.Ct. 1827 at 1833, 36 L.Ed.2d 439 (1973).

A petition is cognizable in habeas corpus when it alleges a denial of due process resulting in a claim of illegal detention by arbitrary government action. See, *Wilwording* v. *Swenson*, 502 F.2d 844, 847-48 (8th Cir. 1974). To be sufficient, the petition must describe a substantial infringement of a constitutional right and a factual statement which, if true, would entitle the petitioner to relief, as in the instant petition. See also, *Preiser* v. *Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439. This Court has set guidelines wherein an evidentiary hearing is required for state petitioners, the lead case being, *Townsend* v. *Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). The instant petition would clearly qualify under *Townsend* guidelines as such.

The district court did not hold an evidentiary hearing in the instant case. An evidentiary hearing is required, as indicated, if there is a dispute of material fact—that is, facts which if true, would entitle the petitioner to relief—and your petitioner, Francis Tracey, was not afforded even a hearing by a magistrate, let alone a full and fair evidentiary hearing in the court below. Congress, and rightly so, has clearly set forth in the § 2255 Rules that a § 2255 petitioner is not required to present his proof fully in his habeas petition and affidavits, but is entitled to present his proof at a full and fair hearing before the district court. This is of greater import in the instant case wherein petitioner is not confined in Federal Prison but resides

in the immediate area of the district court below, and thusly would not have to be transported to the district court at Government expense. See *Procunier* v. *Atchley*, 400 U.S. 446, 451, 91 S.Ct. 485, 488, 27 L.Ed.2d 524 (1971); see also *Patterson* v. *Cuyler*, 729 F.2d 925 (3rd Cir. 1984); see also, *Townsend* v. *Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963).

This Court in *Sunal* v. *Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed. 1982 (1947), at page 180 in 332 U.S., 67 S.Ct. at page 1591, quoting Chief Justice Hughes in *Bowen* v. *Johnston*, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455, said: "***the rule which requires resort to appellate procedure for the correction of errors 'is not one defining power but one which relates to the appropriate exercise of power.'" Therefore, the Court continued, the rule is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." A "very tentative classification of categories in which *habeas corpus* has not been deemed beyond the power of federal courts to entertain" is to be found in Mr. Justice Frankfurter's dissenting opinion in *Sunal*.

In the instant case, the Government knowingly allowed perjured testimony to be admitted by the Government's one and only 'key' and 'crucial' prosecution witness. Further, the Government granted said witness 'pocket-immunity', which immunity was not revealed to the jury, and had the jury known that the Government's 'key' prosecution witness was granted immunity, the jury might have reached a different verdict.

In 1942, prior to the adoption of the Federal Rules of Criminal Procedure, a unanimous Supreme Court held that the deliberate suppression by authorities of evidence favorable to a defendant violates due process. *Pyle* v. *Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 178, 87 L.Ed. 214 (1942). The *Pyle* v. *Kansas* rule was uncomplicated, and it was applied in a

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relatively straightforward manner. It was not limited to the use of perjured testimony or to instances in which a request for exculpatory evidence was made. See *United States ex rel. Ameida* v. *Baldi*, 195 F.2d 815, 820 (3rd Cir. 1952) (state's failure to disclose ballistics evidence helpful to defense), *cert. denied*, 345 U.S. 904 (1953); *United States* v. *Rutkin*, 212 F.2d 641, 644-45 (3rd Cir. 1954) (federal failure to disclose statement of a potentially useful defense witness); *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, 765 (3rd Cir.) (state failure to disclose evidence of defendant's intoxicated condition at time of arrest), *cert. denied*, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955). This court in *Brady* v. *State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), has held that suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

In *Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 104 (1972), this Court held that nondisclosure of a promise of leniency made to a key witness was material, since it could have affected the jury's assessment of that witness' testimony. This is exactly the situation in the instant case as pleaded in petitioner's habeas affidavits. "A new trial is required," wrote Chief Justice Burger, if " 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' ", *Giglio* v. *United States*, 405 U.S. at 154, 92 S.Ct. at 706, quoting *Napue* v. *Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959). Significantly, in *Giglio* the Supreme Court made no mention of the request feature of Justice Douglas' *Brady* formulation.

Most federal courts now hold that the disclosure obligation—(now generally identified as a *Brady*")—existed even in the absence of a request. See *United States* v. *Hibler*, 463 F.2d 455, 459 (9th Cir. 1972); *Levin* v. *Clark*, 408 F.2d 1209, 1210-12 (D.C. Cir. 1968); *United States* v. *Poole*, 379 F.2d 645, 649 (7th Cir. 1967); *Levin* v. *Katzenbach*, 363 F.2d 287,

290 (D.C. Cir. 1966); *Barbee* v. *Warden*, 331 F.2d 842, 845-46 (4th Cir. 1964); *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 137 (2d Cir. 1964); *Simms* v. *Cupp*, 354 F. Supp. 698, 700-01 (D. Ore. 1972); *Clements* v. *Coiner*, 299 F. Supp. 752, 758 (S.D. W.Va. 1969); *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968).

These matters stood when this Court decided *United States* v. *Augurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Augurs*, a federal prosecutor defended his failure to disclose the criminal record of the victim of a homicide on the ground that there had been no specific request for it. The Circuit Court for the District of Columbia Circuit, holding that the information was nevertheless relevant to the defendant's self-defense theory, ordered a new trial. Before this Court, the United States took the position that *Brady* and *Moore* had narrowed *Pyle* by making a specific request a prerequisite to the prosecutor's due process obligation to disclose material favorable to the accused. Brief for Petitioner at 24-33, *United States* v. *Augurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). This position the Court rejected, thereby rehabilitating that portion of *Pyle* v. *Kansas* holding that the prosecutor has a duty to the accused, even in the absence of a request. However, the *Augurs* Court refined the materiality requirement, developing for the first time a three-level test for materiality depending on whether a request has been made.

Under *Augurs*, if the prosecutor knew or should have known of perjured testimony, whether or not a request has been made, then the disclosure of this fact is required by due process if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Augurs*, 427 U.S. at 103, 96 S.Ct. at 2397, 49 L.Ed.2d 342 (1976). This is the situation in the instant case of your Petitioner, Francis Tracey.

The standard for the use of perjured testimony, derived from *Giglio*, is similar to, and evidently more lenient than, the

well-known Rule 33 standard applicable to perjured testimony enunciated in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928) (whether the jury "might have reached a different conclusion"). See, *Giglio* v. *United States*, 405 U.S. 154, 92 S.Ct. 706. See also, *United States* v. *Meyers*, 484 F.2d 113, 116 (3rd Cir. 1973); *Newman* v. *United States*, 238 F.2d 861, 892 n.1 (5th Cir. 1956); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949); *United States* v. *Flynn*, 131 F. Supp. 742, 743 (S.D.N.Y. 1955); *United States* v. *Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y. 1952).

The Third Circuit, in *United States* v. *Oxman*, 740 F.2d 1298 (1984), has held that because the prosecutor withheld specifically requested information concerning immunity agreement that might have been used to impeach significantly government witness who incriminated defendant in tax fraud (excise tax), which is identical to the instant case of your Petitioner, Francis Tracey, and because nondisclosure was not harmless beyond a reasonable doubt inasmuch as witness rebutted defendant's defense, defendant was entitled to a new trial.

Generally prosecutorial misconduct is reducible to certain specific errors which arguably may have prejudiced the defendant. Thus, courts have ordered new trials when the prosecution has knowingly used perjured testimony, as in the instant case. See *Levin* v. *Clark*, 133 U.S. App. D.C. 6, 8, 408 F.2d 1209, 1211 (1967).

In *Levin*, Judge Bazelon stated:

> "The rationale of these cases (concerning the knowing use of perjured testimony) seems to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated."

Quoting District Judge Winner in *United States* v. *Kilpatrick*, 570 F. Supp. 505 (1983):

> "In recent years, the use of "pocket-immunity" has become prevalent. The phrase, for the benefit of the uninitiated, refers to a practice of ignoring the Congressional mandate as to how immunity can be granted and instead of doing what Congress commands, informally substituting a "deal" struck between a prosecutor and a witness."

Further, "not important, of course, is the fact that the pocket immunity need not be included in statistical reports showing the number of immunities granted in federal prosecutions." The history of immunity statutes is set out in footnotes to *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The record in the instant case shows that the Government's 'key' and 'crucial' prosecution witness Francis X. Green denied on both direct and cross-examination that he had been granted immunity by the Government, even though he had "pocket-immunity" in a 'deal' with the United States Attorney.

Conclusion

For reasons of the foregoing arguments and authorities, and based upon the facts of this case and the arguments and authorities set forth in Petitioner Francis Tracey's pending Petition for A Writ of Certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted or in the alternative, whatever relief the Court deems fit to grant.

Respectfully submitted,

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